No. 21161

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REDERI A/B NORDSTJERNAN, etc.,
aka JOHNSON LINE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE CO.,

Appellee.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF OF APPELLANT REDERI A/B NORDSTJERNAN

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I

THE STEVEDORE COMPANY'S AUTHORITIES PROVE THE IMPROPRIETY OF ITS INSTRUCTION THAT THE SHIPOWNER WAS PRECLUDED FROM RECOVERING INDEMNITY IF THE CARGO WAS IN SUCH CONDITION THAT THE STEVEDORE COMPANY WAS HANDICAPPED IN ITS ABILITY TO SAFELY DISCHARGE THE SHIP.

In an abortive attempt to support this erroneous instruction, the Stevedore Company relied in its brief on *Albanese v. N/V Nederl. Amerik, Stoom v. Moots,* 346 F.2d 481 (2nd Cir. 1965) and at the trial relied on *Mortensen v. A/S Glittre,* 348 F.2d 383 (2nd Cir. 1965). A reading of those cases reveals they repudiate the Stevedore Company's claim that this is a proper instruction and fully support the Shipowner's position in this appeal. In *Mortensen,* the Court said at p. 385:

> *"It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over where the contractor's own negligence brought the unseaworthiness of the vessel into play. Crumady v. J. H. Fisser,* 358 U.S. 423, 79 S.Ct. 445, 3 L.ed2d 413 (1959). Despite every opportunity to do so during the course of the trial, no effort was made to show and no claim was made that Glittre's (Shipowner) conduct consisted of anything more than the creation of the hazard which underlay the unseaworthiness claim, *let alone that it amounted to active hindrance of the contractor in the performance of its contractual duties which, as we*

stated in Albanese, supra, at 484 of 346 F.2d, is required to defeat the indemnification action." [italics added]

Thus, according to appellee's authorities, the Shipowner is not precluded from indemnity unless it actively hindered the Stevedore Company. Mere creation of a claimed unsafe condition, such as allegedly improper stowage of cargo, does not preclude the Shipowner from indemnity where, as here, the Stevedore Company had knowledge of that condition and carelessly brought it into play. It follows, therefore, that the Stevedore Company's instruction was erroneous.

II

THE TRIAL COURT ERRED IN DENYING THE SHIPOWNER'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

A. There is no Support in the Evidence or the Law for the Stevedore Company's Claim That There Was No Safe Method of Discharging the Cargo.

Counsel asserts that the Stevedore Company superintendent, with 37 years of expert stevedoring experience, including 20 as its superintendent, made assumptions not consistent with facts in deciding its employees should have broken the rolls over on the shelves. Mr. Mann testified at the trial, however, that in light of all the circumstances he still believed breaking the rolls over onto the shelves was a logical and proper method of doing the work [Rep.Tr. p. 170, lines 13-22]. In short, none of

the circumstances mentioned by counsel had altered the opinion of its superintendent that this was a safe and proper method.

Another safe method was suggested, also, by Mr. Mann. He testified it is a common stevedore practice to "table up" or build a platform on which the longshoremen can work next to the stow [Rep.Tr. p. 145, lines 5-9]. Such a platform could have been constructed in the well and the rolls could have been broken over onto the platform. No evidence was presented that this would have been an unsafe or impractical solution.

In short, the Stevedore Company's superintendent suggested two safe methods of discharge. Counsel should not attempt at this late date to repudiate the very damaging admissions made by Mr. Mann or to impugn his professional skill and judgment. After all, the Stevedore Company has made him the supervisor of its entire operation.

The argument that there was no safe way of doing the work has no legal significance in any event. This argument was recently urged upon the Court by the same counsel in *Crescent Wharf & Warehouse v. Compania Naviera De Baja,* No. 20,197, decided September 16, 1966, (9th Cir. 1966). It was rejected there and should be rejected again. As the Court said at p. 7 of its opinion:

> "If, as contended by Crescent, there was no other method of loading the vessel than the one employed, then we do not believe Crescent was justified in carrying on a loading operation which it knew to be dangerous".

The soundness of the Court's decision is obvious. A Shipowner should be notified at least where there is no safe work method and given an opportunity to decide whether it wants to accept the risk of injury. A Stevedore Company should not be permitted to use a hazardous method of discharge, without notice to the Shipowner, and thereby subject the Shipowner to liability for a resultant injury.

B. The Stevedore Company Cannot Deny It Waives Any Possibility of Breach of Duty by the Shipowner Where It Willingly Elected, Without Consulting or Advising the Shipowner, to Proceed with the Discharge in a Dangerous and Improper Manner.

The merit of the Shipowner's argument was recently redemonstrated in *Crescent Wharf & Warehouse v. Compania Naviera De Baja Calif.*, supra, where this Court said (p. 7 of the opinion):

> "It is apparent . . . that the presence of the flange created a known hazard. Assuming that Compania's [shipowner] action constituted a breach of its contractual obligation, the evidence here justifies a finding of a waiver of said breach. See *Metropolitan Steve. Co. v. Dampskisaktieselskabet Int.*"

There is no doubt that the condition of the stow was well known to the Stevedore Company prior to commencement of discharge operations. Its hatch boss took measurements of the stow [Rep.Tr. p. 66, lines 8-9]. The cargo was carefully examined by the Stevedore Company's hatch boss, ship boss and superintendent [Rep.Tr. p. 138, lines 6-23]. No claim has been made at any time

there was any danger in the stowage not fully known to the Stevedore Company prior to the accident.

In view of the authorities and evidence, it is clear the Stevedore Company waived any breach of duty by the Shipowner. As the Stevedore Company was forced to admit and concede it breached its warranty of workmanlike service [Rep.Tr. p. 281, line 18, to p. 282, line 2], it follows that the Stevedore Company's liability was established and the Shipowner's motions for a directed verdict and judgment notwithstanding the verdict should have been granted.

The Stevedore Company asserts the issue of waiver was not asserted at the trial and cannot be relied on now. There is no merit in this claim because waiver was clearly one of the grounds urged in the trial court for the granting of these motions.

C. Whether Phrased in Terms of Waiver or Otherwise, It is Clear That Where a Stevedore Company has Knowledge of an Unsafe Condition, and Fails to Stop Work or Correct It, the Shipowner is Entitled to a Directed Verdict or Judgment Notwithstanding the Verdict.

This question arose recently in *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, (2nd Cir. 1966), where a longshoreman sued for injuries suffered when he slipped on cargo. The jury denied the Shipowner indemnity but the trial court granted judgment for the Shipowner notwithstanding the verdict. In affirming the ruling on the motion, the Second Circuit stated at p. 122:

> "A Stevedore Company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen v. A/S Glittre,* 348 F.2d 383, 385 (2nd Cir. 1965). Since Ripsett (the Stevedore Company) furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find the Stevedore Company was liable for a breach of its warranty of workmanlike service."

The same rule of law is well settled in this Circuit. See *Matson Terminals, Inc. v. Caldwell,* 354 F.2d 681 (9th Cir. 1965).

CONCLUSION

The Shipowner in this case hired an expert and experienced Stevedore Company to discharge its vessel in a safe and competent manner. The Stevedore Company had sole charge of the discharge operation and at no time, either consulted or advised the Shipowner concerning the status of the operation.

When the Stevedore Company discharged rolls of paper from #5 deep tank, it elected of its own accord, and without notice to the Shipowner, to use a method everyone considered dangerous. The election was made over the protests of the longshoremen and despite the intent of the Stevedore Company's superintendent that the work be done in another way. The method was so hazardous the superintendent declared he would have stopped its use had he known about it. Plaintiff herein was injured as a direct and proximate result of the use of that method.

In this litigation, the Stevedore Company says in effect that, no matter how wanton or unsafe its conduct, the Shipowner should bear the burden of plaintiff's injury. The Stevedore Company's argument overlooks the fact that it is an expert and obligated by law to stop work or correct any condition it considers unsafe.

The burden of this injury should clearly fall on the Stevedore Company, as required by *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 11 L.ed2d 732, 84 S.Ct. 748 (1964). If it had simply done what was required of it by law and common sense, there would have been no injury.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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